No. 14-940

In The
Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, In His Official Capacity
As Governor Of Texas, *et al.*,

Appellees.

**On Appeal From The United States District Court
For The Western District Of Texas**

BRIEF OF THE CITY OF YAKIMA, WASHINGTON AS *AMICUS CURIAE* SUPPORTING APPELLANTS

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U.S. CENSUS BUREAU, 2010 CENSUS, PROFILE OF GENERAL POPULATION AND HOUSING CHARACTERISTICS: 2010, *available at* http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/1600000US5380010 1

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INTRODUCTION[1]

Yakima is the ninth most populous city in Washington with a total population of 91,067.[2] Approximately 41% of the total population is Latino.[3] However, according to the 2009-2013 ACS 5-Year Estimates, Latinos are only 22.74% of Yakima's citizen-voting age population ("CVAP").[4] The percentage of adult Latinos who are eligible to vote (*i.e.*, the Latino CVAP) is only 54.51% of the entire adult

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[1] Although this brief is presented on behalf of a city, it is submitted by the city's outside legal counsel rather than the city's authorized law officer under Rule 37.4. Accordingly, Yakima makes the following disclosure pursuant to Rule 37.6: No counsel for Appellants or Appellees authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consents.

[2] U.S. CENSUS BUREAU, 2010 CENSUS, TOTAL POPULATION, *available at* http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_SF2/PCT1/1600000US5380010.

[3] U.S. CENSUS BUREAU, 2010 CENSUS, PROFILE OF GENERAL POPULATION AND HOUSING CHARACTERISTICS: 2010, *available at* http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/1600000US5380010.

[4] U.S. CENSUS BUREAU, 2009-2013 5-YEAR AMERICAN COMMUNITY SURVEY, SEX BY AGE BY NATIVITY AND CITIZENSHIP STATUS, *available at* http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/B05003/1600000US5380010.

Latino population.[5] In contrast, 99.63% and 97.65% of non-Latino white and African American adults, respectively, are eligible to vote.[6]

In 2012, Yakima was sued in the United States District Court for the Eastern District of Washington ("Eastern District of Washington") under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ("Section 2").[7] The plaintiffs, represented by the American Civil Liberties Union ("ACLU"), claimed that Yakima's method of electing city councilmembers impermissibly diluted Latino voting strength. The plaintiffs prevailed on summary judgment at the liability phase. *Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014).

In the remedy phase, the Eastern District of Washington adopted the ACLU's proposed remedial districting plan without making any revisions. Under

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[5] U.S. CENSUS BUREAU, 2009-2013 5-YEAR AMERICAN COMMUNITY SURVEY, SEX BY AGE BY NATIVITY AND CITIZENSHIP STATUS (HISPANIC OR LATINO), *available at* http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/B05003I/1600000US5380010).

[6] U.S. CENSUS BUREAU, 2009-2013 5-YEAR AMERICAN COMMUNITY SURVEY, SEX BY AGE BY NATIVITY AND CITIZENSHIP STATUS (WHITE ALONE, NOT HISPANIC OR LATINO), *available at* http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/B05003H/1600000US5380010; U.S. CENSUS BUREAU, 2009-2013 5-YEAR AMERICAN COMMUNITY SURVEY, SEX BY AGE BY NATIVITY AND CITIZENSHIP STATUS (BLACK OR AFRICAN AMERICAN ALONE), *available at* http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/B05003B/1600000US5380010.

[7] Recodified as 52 U.S.C. § 10301.

the plan, all seven positions on the Yakima City Council are elected through single-member districts. The plan, while roughly equalizing total population, grossly malapportioned eligible voters[8] among its districts: The plan's maximum CVAP deviation[9] is 63.98%, which far exceeds the maximum CVAP deviation in the Texas Senate Plan S172 at issue in this case (between 45.95% and 47.87%). Brief for Appellants 11, tbl. 2.

Yakima objected to the severe malapportionment of eligible voters, but the Eastern District of Washington agreed with the ACLU that massive CVAP imbalance was legally irrelevant. Yakima appealed to the United States Court of Appeals for the Ninth Circuit and requested a stay pending the disposition of this case. The stay was granted.

Yakima agrees with Appellants that this case presents a justiciable question. Yakima further agrees

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[8] This brief uses the terms "eligible voters" and "CVAP" interchangeably.

[9] The phrase "maximum CVAP deviation" means the absolute value of the difference between the district with the highest percentage deviation from the "ideal" CVAP population and the district with the lowest percentage deviation. As an illustration, if a city has an overall CVAP of 7,000 and is divided into seven districts, then the "ideal" CVAP population for each district is 1,000. If the district with the highest CVAP has 1,250 eligible voters (or 25% above the "ideal") and the district with the lowest CVAP has 600 eligible voters (or 40% below the "ideal"), then the maximum CVAP deviation would be 65%. *See, e.g., Brown v. Thomson*, 462 U.S. 835, 842, 846 (1983).

that districts should be apportioned based on CVAP because "what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation"[10] *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 782 (1990) (Kozinski, J., concurring in part and dissenting in part). However, if this Court hesitates to overrule the existing practice of apportioning based on total population, or if this Court allows states and localities to choose their own apportionment basis, then this Court must still protect electoral equality. This Court should require that the drafter of a redistricting plan apportioned with total population should strive to equalize the CVAP among each district insofar as possible, while also adhering to "traditional race-neutral districting principles." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This holding would balance the principles of representational and electoral equality.

This holding would also be workable with available demographic data. The Census Bureau publishes full-count data on the total population and sample-based estimates of the CVAP. As Appellees and *amici* in support of Appellees will likely argue,

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[10] The terms "electoral equality" and "electoral balance" refer to the "principle . . . that, regardless of the size of the whole body of constituents, political power, as defined by the number of those eligible to vote, is equalized as between districts." *Garza*, 918 F.2d at 782. The term "representational equality" refers to the principle that "representatives are chosen by a district's voters, but should represent all persons resident therein." *Chen v. City of Houston*, 206 F.3d 502, 525 (5th Cir. 2000).

CVAP estimates are less precise as an apportionment basis than the full count of the total population. However, CVAP estimates can gauge the severity of electoral inequality among districts – comparatively between two plans, or relative to a benchmark (*e.g.*, the lowest feasible limit of inequality). Requiring that a redistricting plan avoid an unnecessarily extreme CVAP imbalance could be practically implemented.

Even where unnecessarily extreme electoral imbalance is avoided, a proposed redistricting plan still may register severe electoral imbalance based on CVAP disparities. In those instances, adopting a single-member district plan would require sacrificing electoral equality, the constitutional tenet at the heart of the one person, one vote requirement. Whatever the reason might be for imposing a single-member district plan in those circumstances (*e.g.*, remedying a Section 2 violation), "everything must give way" to the "superior provisions of the constitution of the United States." *In re Walsh*, 104 F. 518, 520 (D.S.D. 1900). To meaningfully protect the constitutional guarantee of the one person, one vote rule, this Court should forbid the use of single-member districts in jurisdictions where intolerably high CVAP disparities cannot be avoided.

INTEREST OF THE *AMICUS CURIAE*

Since 1977, Yakima had conducted its City Council elections under an at-large system. Elections were staggered and occurred during odd-numbered years, so that either three or four positions were contested every two years. For three of the seven positions, candidates participated in an at-large primary election. The top two candidates for each position then competed in an at-large general election.

Two years later, the remaining four positions were contested. Each of these four positions corresponded to one of four residency districts of approximately equal total population. In the primary election, only voters residing within a district could vote for candidates from that district. The top two candidates from each district then competed in an at-large general election, in which voters from anywhere in the city could cast a ballot for the district-based candidates.

In 2011, the voters of Yakima rejected a proposition that would have amended the city charter to require all councilmembers to be elected through single-member districts. Opponents of the proposition included the editorial board of local paper of record, who urged voters to reject the proposition because it did not provide any citywide representation.

One year later, Yakima and the seven councilmembers were sued under Section 2. The two plaintiffs, one a former Latino candidate for City Council and the other a Latino voter, alleged that Yakima's

method for electing councilmembers impermissibly diluted the strength of Latino voters.

The parties cross-moved for summary judgment at the close of discovery. In their motion, the plaintiffs argued that there was no genuine issue of material fact as to their Section 2 claim. The first element of their claim required the plaintiffs to show that Latinos were "sufficiently large and geographically compact" to form a majority in a single-member district.[11] For this element, the plaintiffs offered five different redistricting plans. In each plan, all seven City Council positions were elected in single-member districts. Each plan was apportioned based on total population and included a district in which Latinos were a majority of the CVAP.

In its summary judgment motion, Yakima argued that the plaintiffs' claim should be dismissed because, among other reasons, they failed to satisfy their burden under the first *Gingles* factor by presenting a constitutionally valid plan. Specifically, Yakima argued that the plaintiffs had intentionally ignored the extreme CVAP imbalances among each of their plans. Yakima showed that the maximum CVAP deviation

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[11] This element is commonly referred to as the "first *Gingles* factor," which is one of three threshold conditions for establishing a vote dilution claim. *See Gingles v. Thornburg*, 478 U.S. 30 (1986). "The Ninth Circuit, along with every other circuit to consider the issue, has held that CVAP is the appropriate measure to use in determining whether an additional effective majority-minority district can be created." *Cano v. Davis*, 211 F. Supp. 2d 1208, 1233 (C.D. Cal. 2002) (internal citation omitted).

ranged from 61.47% to 70.72% among the five plans. Yakima further offered the deposition testimony of the plaintiffs' demographer, who admitted that he did not attempt to reduce the imbalance in CVAP among the districts in the plans he drafted for the plaintiffs and conceded that he did not even consider the CVAP disparities in his plans. Yakima argued that the plaintiffs' total disregard for electoral equality should doom their Section 2 claim.

The plaintiffs responded that severe malapportionment of eligible voters was immaterial to the validity of the plans. Agreeing with the plaintiffs, the Eastern District of Washington rejected Yakima's contention that "an imbalance in citizen voting-age population . . . is relevant to the 'one person, one vote' calculus." *Montes*, 40 F. Supp. 3d at 1397. The Eastern District of Washington granted the plaintiffs' summary judgment motion and found that Yakima's system for electing councilmembers violated Section 2. *Id.* at 1415. The parties were instructed to submit proposed remedial districting plans. *Id.*

In the remedy phase, the plaintiffs proposed one of the five plans previously submitted in the liability phase. Their proposed plan had a maximum CVAP deviation of 63.98%. The district with the fewest eligible voters (District 1, the only district where Latinos were a majority of the CVAP) had a CVAP of approximately 4,816. In contrast, the district with the most eligible voters (District 7) had a CVAP of approximately 9,847 – over twice the number of eligible voters as in District 1.

Yakima contended that the plaintiffs' plan still suffered from extreme electoral inequality and that the plaintiffs made no attempt to reduce the CVAP imbalance in their plan before proposing it in the remedy phase. The plaintiffs, as they had throughout the litigation, argued that CVAP apportionment was not a relevant redistricting criterion. The Eastern District of Washington again agreed with the plaintiffs and focused its one person, one vote analysis exclusively on whether total population was approximately equal among the districts.

The Eastern District of Washington approved the plaintiffs' plan without making any revisions. It also adopted the plaintiffs' proposal that all seven positions on the City Council would be contested in 2015, even though only four of the incumbent councilmembers were up for reelection in 2015 (the terms of the other three councilmembers did not expire until 2017). The Eastern District of Washington prematurely ended the terms of three councilmembers despite stating that there was no evidence "the City . . . engaged in any wrongdoing." *Montes*, 40 F. Supp. 3d at 1407.

After unsuccessfully moving for reconsideration, Yakima appealed both the liability and remedy phases of the case and requested that the Ninth Circuit stay its appeal pending this Court's disposition of this case. The stay was granted. *Montes v. City of Yakima*, Nos. 15-35309, 15-35593 (9th Cir.), Docs. 16, 17.

Yakima is a more extreme instance of the issue raised by Appellants in this case. The maximum CVAP deviation in the plan adopted by the Eastern District of Washington (63.98%) far exceeds that of Texas Senate Plan S172 (between 45.95% and 47.87%). Yakima also exemplifies the severe distortions that occur when electoral equality is disregarded: The voters in District 1 have more than *twice* the voting power of voters in District 7.

Furthermore, Yakima's case is more acute in terms of the neglect for the one person, one vote requirement. In this case, Appellants submitted a declaration to the three-judge panel from their expert demographer establishing that it was possible to substantially equalize the CVAP in each district within Texas Senate Plan S172 without departing from the goal of equalizing each district's total population. This conclusion implies that the drafters of Texas Senate Plan S172 could have reduced the CVAP imbalances, but chose not to. In the case against Yakima, however, no implications need to be drawn because the plaintiffs' demographer explicitly admitted that he disregarded the CVAP allocation in his plans.

Yakima submits this *amicus* brief to notify this Court of the circumstances in Yakima. Instances of extreme electoral imbalance are not confined to Texas. This issue will occur with increasing regularity due to the combination of shifting demographic trends and the efforts of organizations such as the ACLU using litigation to impose single-member districts on jurisdictions. Historically, single-member district plans

did not create extreme CVAP imbalances because total population was a reliable proxy for eligible voters. That is no longer true in many jurisdictions. Instead of applying Section 2 "in light of current conditions,"[12] many lower courts and Section 2 plaintiffs simply ignore the severe electoral imbalance that is arising with growing frequency.

Yakima further urges this Court to issue a clear ruling in this case that lower courts can readily apply. Yakima's own appeal has been stayed pending this Court's disposition of this case, and Yakima seeks a decision that can be implemented with minimal confusion once the stay is lifted. Moreover, the opportunities for this Court to clarify the meaning of the one person, one vote requirement in subsequent cases may be limited, as appeals in redistricting cases are sometimes withdrawn by a majority of the governing body elected under the new election system.[13]

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[12] *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2627 (2013).

[13] Dianne Solís, *Farmers Branch City Council votes to drop its appeal of Voting Rights Act case*, THE DALLAS MORNING NEWS, July 22, 2013, *available at* http://thescoopblog.dallasnews.com/2013/07/farmers-branch-city-council-votes-to-drop-its-appeal-of-voting-rights-act-case.html/ (referring to *Fabela v. City of Farmers Branch*, No. 3:10-CV-1425-D, 2012 U.S. Dist. LEXIS 108086 (N.D. Tex. August 2, 2012), in which defendants argued that creating single-member district plans with extreme CVAP disparities violated the one person, one vote rule).

SUMMARY OF THE ARGUMENT

Yakima agrees with Appellants that this case presents a justiciable question, and that the one person, one vote rule of the Fourteenth Amendment's Equal Protection Clause requires districts to be apportioned based on CVAP. However, Yakima recognizes that this Court may hesitate to require states and localities to adopt a new apportionment basis. Yakima submits that representational and electoral equality both can be protected to a meaningful degree if drafters of redistricting plans apportion with total population while endeavoring to avoid unnecessary CVAP imbalance. This requirement can be practically implemented: Although citizenship statistics are based on sample data, those data are accurate and sufficiently reliable for drafters to use in determining whether extreme CVAP deviations can be avoided. Even after unnecessary CVAP imbalance is eliminated, however, there may be circumstances in which the gross malapportionment of eligible voters is unavoidable. In those instances, the one person, one vote requirement should forbid the use of single-member districts.

ARGUMENT

I. The One Person, One Vote Requirement Must Provide Some Protection to Electoral Equality

The one person, one vote requirement has a "long and prestigious pedigree."[14] First recognized in *Gray v. Sanders*, 372 U.S. 368 (1963), the requirement has always protected "the right to have the vote counted at full value without dilution or discount." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

However, the meaning of this protection has remained unclear. This Court held in *Reynolds* that state electoral districts "must be apportioned on a population basis,"[15] but two years later noted in *Burns v. Richardson* that "[a]lthough total population figures were in fact the basis of comparison in [*Reynolds*] and most of the others decided that day, our discussion carefully left open the question of what population was being referred to."[16] To this day, that question is still open, which is understandable given that "in almost all cases th[is] Court was dealing with situations in which total population was

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[14] Kent D. Krabill & Jeremy A. Fielding, *No More Weighting: One Person, One Vote Means One Person, One Vote*, 16 TEX. REV. L. & POL. 275, 278 (2012).

[15] 377 U.S. at 568.

[16] 384 U.S. 73, 91 (1966).

presumptively an acceptable proxy for potentially eligible voters."[17]

That proxy relationship does not hold true, however, in areas such as Yakima that have experienced the relatively recent phenomenon of "large influx[es] of concentrated illegal immigration,"[18] or in other jurisdictions with significant populations of disenfranchised felons.[19] The Courts of Appeals for the Fourth, Fifth, and Ninth Circuits have all attempted to clarify the one person, one vote requirement in areas with substantial numbers of ineligible voters. In 1990, the Ninth Circuit defined the one person, one vote requirement in favor of representational equality, holding that the "apportionment for state legislatures *must* be made upon the basis of population."[20] In 1996 and 2000, respectively, the Fourth and Fifth Circuits held that local jurisdictions are allowed to choose their own apportionment basis.[21]

Garza, *Daly*, and *Chen* do not afford any protection to electoral equality. Under those decisions, jurisdictions are free to ignore any CVAP imbalance among their districts (indeed, *Garza* requires states

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[17] *Chen*, 206 F.3d at 525.

[18] Krabill & Fielding, *No More Weighting*, *supra*, at 282.

[19] *See, e.g.*, *Davidson v. City of Cranston*, 42 F. Supp. 3d 325 (D.R.I. 2014).

[20] *Garza*, 918 F.2d at 774.

[21] *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996); *Chen*, 206 F.3d at 528.

and localities to ignore any imbalance). The Fourth, Fifth, and Ninth Circuits all permit a jurisdiction to draft a redistricting plan in which eligible voters are severely malapportioned. As Appellants have explained, existing precedent would have allowed the Texas Legislature to apportion its districts based on total population, even if 30 of the 31 districts contained only one voter and the 31st district contained every other voter in the state. Br. of Appellants 36-37.

The one person, one vote rule cannot permit such absurd results. The Constitution must afford some protection to electoral equality, and this Court's jurisprudence supports that conclusion. In *Gray*, this Court announced that "*all who participate* in the election are to have an equal vote" and that the "concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who *meet the basic qualifications*." 372 U.S. at 379-80 (emphasis added). And in *Reynolds*, this Court explained that giving the votes of some citizens "two times, or five times, or 10 times the weight of votes" of other citizens would be no more constitutional than allowing some voters to "vote two, five, or 10 times" or "multipl[ying]" some votes by "two, five, or 10." 377 U.S. at 562.

Critically, *Reynolds* discusses the weighting of votes relative to other votes, and not relative to overall population. *Id.* at 579 ("The overriding objective must be substantial equality of population among the various districts, *so that* the vote of any citizen is

approximately equal in weight to that of any other citizen in the State.") (emphasis added). If this Court intended for the one person, one vote requirement to require equalizing total population among districts, then this Court would have spoken about the harm of allowing a voter to cast a ballot *on behalf of* more people than a voter in another district. Instead, this Court was concerned with allowing some voters to effectively vote more than once. This circumstance arises when some districts have more voters than others, not when districts have greater total populations than others.

Burns does not change the conclusion that the one person, one vote requirement protects electoral equality. In that case, Hawaii used registered voters to apportion its legislative districts. This Court approved of this apportionment basis, explaining that "[t]he decision to include or exclude" certain groups from an apportionment basis "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." 384 U.S. at 92. However, this Court added a caveat: The jurisdiction's choice of apportionment basis is allowed "unless a choice is one the Constitution forbids." *Id.*

Burns did not specifically state what the constitution prohibited, but it rejected the proposition that Hawaii's apportionment basis was unconstitutional because it did not "approximate total population distribution." *Id.* at 94. This Court held instead that Hawaii's apportionment basis was constitutional

because it "appears that the distribution of registered voters approximates distribution of state citizens or another permissible population basis." *Id.* Under *Burns*, the one person, one vote requirement tolerates the malapportionment of total population among districts, provided that the apportionment basis at least "approximates distribution of state citizens." *Id.*

Gray, *Reynolds*, *Burns*, and their progeny evince a clear intent to protect electoral equality. This, then, should be the starting point of this Court's decision in this case: The one person, one vote requirement affords at least some protection to electoral equality. Consequently, *Daly*, *Chen*, and *Garza* must be overruled because they allow (and, in the case of *Garza*, require) states and localities to apportion based on total population without requiring any consideration of electoral equality. Although a jurisdiction in the Fourth Circuit or Fifth Circuit could theoretically choose to apportion based on CVAP under existing law, *Daly* and *Chen* must still be overruled because they allow total-population apportionment without any regard to CVAP imbalances.

Even if this Court is not inclined to require districts to be apportioned by CVAP, this Court should at least hold that the one person, one vote requirement did not intend to allow local jurisdictions to ignore the allocation of CVAP altogether.

II. This Court Should Protect Electoral Equality by Requiring Drafters of Redistricting Plans to Avoid Unnecessary CVAP Imbalance, Which is Feasible with Available Demographic Data

Yakima concurs with Appellants and Judge Kozinski that "what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation," and therefore districts should be apportioned based on CVAP. *Garza*, 918 F.2d at 782. However, this Court may hesitate to mandate a new apportionment basis for states and localities. If this Court is inclined to affirm the practice of apportioning based on total population, then this Court should still protect electoral equality by requiring drafters of redistricting plans to avoid unnecessary CVAP imbalance. Alternatively, if this Court intends to allow local jurisdictions to choose their own apportionment basis, then this Court should still mandate that a plan apportioned with total population must still avoid unnecessary CVAP imbalance.[22]

Imposing this requirement will allow jurisdictions to continue apportioning based on total

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[22] Because the one person, one vote requirement is a constitutional mandate, eliminating unnecessary CVAP imbalance would be compelled in all redistricting contexts, including regular reapportionments following the publication of the federal decennial Census or the drafting of redistricting plans during the liability and remedy phases of Section 2 litigation.

population but will prevent them from neglecting electoral inequality, which occurred in both this case and in the lawsuit against Yakima. In each matter, no attempt was made to eliminate the gross CVAP disparities in the redistricting plans that were eventually adopted. In this case, Appellants' expert demographer submitted a declaration establishing that there were many feasible ways to draw the Texas Senate districts with approximately equal total populations but without gross deviations in CVAP. In the Yakima litigation, the plaintiffs' demographer conceded in his deposition that he made no attempt to reduce the CVAP imbalance in the redistricting plans that the plaintiffs relied on in the liability and remedy phases. In both this case and *Montes*, electoral equality was a potentially avoidable casualty of the redistricting process.

Drafters of redistricting plans can easily optimize a plan to prevent unnecessary collateral damage. For example, drafters already avoid unnecessarily splitting existing voting precincts.[23] Moreover, mandating the elimination of unnecessary CVAP imbalance is a workable requirement given the available demographic data. "The sole source of citizenship data published by the Census Bureau is the ACS, an annual nationwide sample survey that collects demographic

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[23] *See, e.g.*, *Large v. Fremont Cty.*, 709 F. Supp. 2d 1176, 1191 (D. Wyo. 2010) ("The plans were drawing using, to the extent possible, borders of existing precinct boundary lines, and Mr. Cooper testified that they complied with traditional redistricting criteria.").

information, including age, race, ethnicity, and citizenship. With this data, demographers can estimate the CVAP of states, counties, cities, census tracts, and block groups. The Census Bureau combines CVAP data over five year periods to provide reliable estimates for small areas, such as census tracts and block groups."[24]

Appellees and some *amici* may argue that CVAP data is not sufficiently precise to use as an apportionment basis. Even if persuaded by this argument, this Court should not ignore electoral equality altogether. CVAP data, and associated margins of error, can be used to determine whether unnecessarily extreme variance exists among the eligible voter populations in districts. CVAP data provide "point estimates"[25] of the population of eligible voters in each district, along with margins of error. The point estimate for a district can be compared to that of any other district. The CVAP of an entire jurisdiction is readily available through the ACS data, which provides the ideal CVAP

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[24] *Cisneros v. Pasadena Indep. Sch. Dist.*, No. 4:12-CV-2579, 2014 U.S. Dist. LEXIS 58278, at *12 (S.D. Tex. April 25, 2014) (citing U.S. CENSUS BUREAU, A COMPASS FOR UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT GENERAL DATA USERS NEED TO KNOW (Oct. 2008), *available at* http://www.census.gov/acs/www/Downloads/handbooks/ACSGeneralHandbook.pdf).

[25] "The point estimate is the most likely value given by the data and methodology but, as an estimate, it is subject to a margin of error." *Fabela v. City of Farmers Branch*, No. 3:10-CV-1425-D, 2012 U.S. Dist. LEXIS 108086, at *18 (N.D. Tex. Aug. 2, 2012).

of a district (*e.g.*, total CVAP divided by the number of districts). Though these numbers have known margins of error, demographers can calculate the maximum CVAP deviation by identifying the two districts with the greatest negative and positive deviations, respectively, from the ideal CVAP, and the margin of error associated with that deviation. Accordingly, ACS data enable demographers to compare the maximum CVAP deviation among multiple redistricting plans.

To illustrate, assume a local jurisdiction has an overall CVAP of 5,000, and that the margin of error for the overall CVAP estimation is plus-or-minus 250. If this jurisdiction is divided into five districts, then the ideal CVAP for each district is 1,000. Assume that two different redistricting plans are proposed. The first has five districts of roughly equal total population and CVAP. The second has five districts of roughly equal total population, but one district has a CVAP of 1,400, while the other four districts have a CVAP of 900. Although the CVAP estimates for each district in both plans are subject to margins of error, the first plan demonstrably avoided CVAP imbalance, while the second plan did not.

As set forth above in this brief, as well as skillfully argued in the briefs of Appellants and *amici* in support of Appellants, the one person, one vote requirement was never intended to permit the complete disregard of electoral equality. Yet most states and localities subscribe to representational equality by apportioning based on total population. This Court can reconcile the two principles of equality by requiring

drafters of any redistricting plan apportioned based on total population to avoid unnecessarily extreme CVAP imbalance.

III. The One Person, One Vote Requirement Forbids the Use of Single-Member Districts in Jurisdictions Where Intolerably High CVAP Variance Cannot Be Avoided

Even after eliminating unnecessarily extreme CVAP imbalance, a state or locality that apportions based on total population may find itself with an unavoidably high degree of CVAP variance. For example, a jurisdiction may consider voluntarily switching to a single-member district plan. The drafter could approximately equalize total population, eliminate unnecessary CVAP imbalance, and adhere to other traditional redistricting criteria, and yet still be confronted with grossly malapportioned eligible voter populations. The same problem could occur when a state or locality apportions its districts based on total population following the publication of the decennial Census: Even if the drafters eliminate all *unnecessary* CVAP imbalance, their plan may still contain *unavoidable* CVAP imbalance of an extreme degree.

Or a jurisdiction may encounter a situation like Yakima, where the plaintiffs suing the jurisdiction under Section 2 cannot satisfy their burden in the liability phase without proposing a single-member district plan that grossly malapportions eligible voter populations among the districts for some other

purpose. In that instance, dividing a jurisdiction into single-member districts would necessarily cause extreme electoral inequality.

The one person, one vote requirement does not meaningfully protect electoral equality unless the use of single-member districts is prohibited in the situations described above. While requiring drafters to eliminate unnecessarily extreme CVAP imbalance provides some protection to electoral equality, that protection does not disappear once avoidable disparities have been removed. If the use of single-member districts would inevitably lead to the gross malapportionment of CVAP among districts, then single-member districts cannot be used in that jurisdiction. To hold otherwise would ignore the "fundamental idea[ ] of democratic government"[26] that "[t]he overriding objective [of redistricting] must be substantial equality of population among the various districts, *so that* the vote of any citizen is approximately equal in weight to that of any other citizen of the State."[27]

The argument that electoral equality should give way to some other objective (such as remedying alleged vote dilution under Section 2) cannot be reconciled with the hierarchy of legal authority. The right of "all who participate in the election . . . to have an equal vote . . . is required by the Equal Protection Clause of the Fourteenth Amendment." *Reynolds*, 377

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[26] *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

[27] *Reynolds*, 377 U.S. at 579 (emphasis added).

U.S. at 557-58. Section 2, in contrast, is a "*statutory* prohibition of all voting rights discrimination."[28] Though the interest in remedying vote dilution is undoubtedly legitimate, "everything must give way" to the "superior provisions of the constitution of the United States." *In re Walsh*, 104 F. at 520.

Further, even assuming that remedying a Section 2 violation is a compelling state interest,[29] this goal would not justify the use of single-member districts when doing so would create unavoidable extreme CVAP imbalance. Using race as the predominant factor in drawing district lines may survive strict scrutiny if it does not subordinate traditional race-neutral redistricting criteria to race any more than is "reasonably necessary" to avoid liability under Section 2.[30] However, this Court recently clarified that the one person, one vote rule is "not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, 'traditional' factors in the drawing of district boundaries."[31] Instead, it is "part of the redistricting background" and "taken as a given."[32] Accordingly, a compelling

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[28] S. REP. NO. 94-417, at 30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207 (emphasis added).

[29] *See Bush v. Vera*, 517 U.S. 952, 976 (1996).

[30] *Id.* at 978-79.

[31] *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015).

[32] *Id.*

state interest cannot justify the gross malapportionment of CVAP.

In *Mahan v. Howell*, this Court stated that a maximum total population deviation of 16.4% "may well approach tolerable limits."[33] And in *Chapman v. Meier*, this Court struck down a plan with a deviation of 20.14% as constitutionally impermissible.[34] The plan adopted by the Eastern District of Washington had a maximum CVAP deviation of 63.98%, more than *three times* the deviations in *Mahan* and *Chapman*. With Yakima's demographics, it is unlikely that a single-member district plan can be created without causing intolerable levels of electoral inequality. Thus, imposing single-member districts in Yakima and comparable jurisdictions would necessarily cause a violation of the one person, one vote rule. As such, an alternative voting system must be adopted instead.[35]

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[33] 410 U.S. 315, 329 (1973).

[34] 420 U.S. 1, 21-26 (1975).

[35] At-large election systems are not all created equal. The system used in Yakima was "winner-takes-all" with a top-two primary, meaning that voters could select from only two candidates at the general election and the candidate with a simple majority of the voters was elected. Modified at-large elections, such as cumulative and limited voting can "cleanse[ ]" at-large systems of their "dilutive effects." Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 St. Louis U. Public L. Rev. 97, 98 (2010). Moreover, "[n]othing in [this Court's] present understanding of the Voting Rights Act places a principled limit on the authority of federal

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Single-member district plans have been and will continue to be imposed without regard to the severe malapportionment of eligible voters. That cannot continue in light of "current conditions," which Yakima and this case exemplify. *Shelby Cnty.*, 133 S. Ct. at 2629.

CONCLUSION

This Court should hold that this case presents a justiciable question, and that the one person, one vote requirement requires districts to be apportioned based on CVAP. The judgement entered against Appellants below in this case should therefore be reversed. Alternatively, this Court should reverse the judgment below with instructions that any redistricting plan apportioned based on total population must avoid all unnecessarily extreme CVAP imbalance, and that single-member districts are prohibited if gross CVAP deviations are inevitable.

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courts that would prevent them from instituting a system of cumulative voting as a remedy under Section 2." *Holder v. Hall*, 512 U.S. 874, 897-99 (1994) (Thomas, J., concurring in the judgment); *see also Branch v. Smith*, 538 U.S. 254, 309-10 (2003) (O'Connor, J., concurring).

Respectfully submitted this 7th day of August, 2015.

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